

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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SUSAN DOWNEY,

Complainant,

vs.

COMMUNITY COLLEGES IN COLORADO, ARAPAHOE COMMUNITY COLLEGE,

Respondent.

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THIS MATTER is before Administrative Law Judge Mary S. McClatchey. On May 5, 2003, the parties jointly moved to vacate the hearing and to set this matter for decision on the briefs. On May 6, 2003, the motion was granted, and the parties were ordered to submit Stipulated Facts and a briefing schedule. Upon approval of the briefing schedule, both parties submitted Opening Briefs on June 6, 2003; Respondent filed an Answer Brief on June 12, 2003; and Complainant filed a Reply Brief on June 17, 2003. Mark Schwane, Esquire, represented Complainant Susan Downey ("Complainant" or "Downey"). Assistant Attorney General Hollyce Farrell represented Respondent Community Colleges in Colorado, Arapahoe Community College ("Respondent" or "ACC").

**MATTER APPEALED**

Complainant appeals the decision of Respondent to reduce her salary by over \$800.00 monthly upon exercise of retention rights following layoff. She claims she was entitled to maintain her current salary rate, and that the decision to reduce her salary to the rate of her predecessor was arbitrary, capricious, and contrary to rule or law. For the reasons set forth herein, Respondent's action is rescinded.

**ISSUES**

1. Whether the action of Respondent was arbitrary, capricious, or contrary to rule or law;
2. Whether Complainant is entitled to an award of attorney fees and costs.

**FINDINGS OF FACT**

1. In August 1993, Complainant commenced employment with Respondent.

2. As of March 2003, Complainant held the position of Administrative Assistant III, Student Life Healthcare Technician II, at ACC.
3. On March 26, 2003, Complainant was laid off. By letter dated March 26, 2003, Respondent notified Complainant that due to lack of funds, her position, #32, would be abolished effective March 28, 2003.
4. In the same letter, Respondent notified Complainant that she had retention rights to another Administrative Assistant III position, #292, in the Nursing Department.
5. Position #292 is in the same class and pay grade as position #32.
6. The salary range for the Administrative Assistant III class is \$2361.00 to \$3353.00 per month.
7. At the time of Complainant's layoff, Position #292 was occupied by Todd Boyd. Boyd had been employed by Respondent for nine months, since July 29, 2002. He was paid at the low end of the pay scale for Administrative Assistant III's, \$2445.00 per month.
8. Complainant's salary at the time of layoff was \$3250.00 monthly, near the top of the pay scale, thereby reflecting her ten years of service with Respondent.
9. In its March 26 layoff letter, Respondent advised Complainant that the salary for position #292 was \$2445.00. It also informed her of the following:

"You have three days from the date you receive this letter to notify me, in writing if you wish to accept the above offer. If you do not accept the offer within three days, you will be laid off effective close of business on May 12, 2003. Your name will be placed on a reemployment list for a maximum of one year unless you are reemployed in a position in your current class before the one-year period expires.

If you do not accept position #292, effective March 31, 2003 you will be on paid Administrative Leave. As of this date you will not be required to report to work."

10. Director's Procedure P-3-8 provides that laid off employees that are reemployed shall be "compensated at the base pay rate held at the time of layoff, including saved pay rate if it is within three years of the date the employee was placed in saved pay."
11. According to the terms of the March 26 letter, therefore, Respondent offered Complainant the following choice:
  - A. Accept unemployment and hope for reemployment within a one year period, at which time she would be assured her same base pay rate; or
  - B. Exercise retention rights and thereby suffer an immediate reduction in base pay of \$805.00 per month.

12. On March 27, 2003, Complainant informed David J. Castro, Director of Human Resources, that she would exercise retention rights to position #292. She began working in the position immediately upon abolishment of her prior position, at a monthly gross salary cut of \$805.00 per month.

13. Complainant timely filed a notice of appeal with the State Personnel Board, claiming she "received a reduction in base pay based on her decision to exercise her retention rights," and seeking reinstatement to her former base pay, back pay, and attorney fees.

14. Position #292 is funded in part by a federal Perkins Grant. At the time Boyd held the position, it was funded at a level of \$35,352.00 annually. The salary level funded through the grant is a suggested baseline. Nothing in the grant precludes the state from supplementing the position through other sources.

## **APPLICABLE RULES AND PROCEDURES**

### **CHAPTER 3, COMPENSATION**

#### **GENERAL PRINCIPLES**

R-3-1. The Department of Personnel shall establish procedures governing compensation for the state personnel system. Every employee shall be compensated within the pay grade assigned to a class.

P-3-1. Compensation practices shall provide for equitable and fair treatment of similarly situated employees.

#### **COMPENSATION RATES**

P-3-6. Saved pay is used for certain downward movements. It occurs when current base pay is maintained at a rate that falls between the grade maximum and a statutory lid. . . .

P-3-8. No employee shall be paid below the minimum of the pay grade. A new employee, including those returning after resignation, may be hired at a rate that does not exceed the grade maximum.

**A. Reemployed employees are compensated at the base pay rate held at the time of layoff**, including saved pay rate if it is within three years of the date the employee was placed in saved pay. This also applies to employees returning during the initial contract period for a non-classified appointment. (Emphasis added.)

#### **DOWNWARD ADJUSTMENTS**

P-3-11. In the case of system maintenance studies and individual allocations of positions,

the base pay shall remain the same, including saved pay.

P-3-12. In the case of other downward movements, the base pay shall not exceed the current rate and shall not be above the maximum in the new grade.

## LATERAL ADJUSTMENTS

P-3-15. In the case of a lateral movement to a different position, base pay shall be any rate between the current rate and the grade maximum.

## CHAPTER 7, SEPARATION

### LAYOFF PRINCIPLES

Retention Rights.

R-7-18. An employee must meet the minimum qualifications and any bonafide special qualifications in order to have retention rights to a position. Certified employees can displace certified employees in more junior time bands. . . The department shall offer retention rights in the following priority: 1. Funded position in the current certified class. . . 2. Funded vacant position in a previously certified class at the same maximum pay rate. . . 3. Highest level demotion in a vacant position in the current or previously certified class series.

## CHAPTER 12, DEFINITIONS

R-12-8. Downward Movement. Change to a different class with a lower maximum, e.g. non-disciplinary or disciplinary demotions, individual allocations, system maintenance including class placement, or the annual total compensation survey.

R-12-16. Lateral Movement. Change to a different class or position with the same maximum, e.g., transfers, individual allocations, system maintenance studies including class placement, or the annual total compensation survey. . . .

R-12-17. Layoff. Process of involuntarily separating an employee due to abolishment of the position for lack of work, lack of funds, reorganization, or displacement by another employee exercising retention rights.

P-12-20. Pay Grade. A number used to identify a pay range assigned to a class. It reflects the minimum and maximum base salary rates for work in a specific class. Individual salaries vary within the ranges depending on individual movements in accordance with these provisions. Synonymous with pay level, range, or band.

R-12-21. Reemployment. The right of an employee to be returned or rehired to the class from which separated by layoff.

P-12-25. Saved Pay Rate. Temporary means of maintaining current base pay during certain situations that accommodate base pay amounts between the maximum of a pay grade and a statutory lid.

## DISCUSSION

### I. Burden of Proof.

Complainant bears the burden of proving that Respondent's decision to reduce Complainant's base pay rate upon her exercise of retention rights was arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S. Because layoffs constitute administrative, not disciplinary, adverse employment actions, they do not implicate the constitutional protections afforded certified employees who are disciplined for cause. *See Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994)(agency bears burden to prove factual basis for disciplinary action taken); *Harris v. State Bd. of Agriculture*, 968 P.2d 148 (Colo.App. 1998); *Hughes v. Dept. of Higher Education*, 934 P.2d 891 (Colo. App. 1997).

### II. Director's Procedure P-3-15

Complainant's movement from position #32 to #292 constitutes a "lateral movement" as defined by R-12-16, since it involved a change to a different position with the same maximum pay. Director's Procedure P-3-15 provides, "In the case of a lateral movement to a different position, base pay shall be any rate between the current rate and the grade maximum." Both parties concede that no Board rule or Director's procedure defines "current rate."

Respondent argues that the more logical interpretation of P-3-15 is to apply the term "current rate" not to the employee engaging in the lateral movement, but to the anonymous individual vacating the position. However, this interpretation is contrary to the intent of the rules governing employee movements, and defies common sense. An examination of the term "current rate" as it is used in Director's Procedure P-3-12, concerning "downward movements," is helpful. The rule states, "In the case of other downward movements, the base pay shall not exceed the current rate and shall not be above the maximum in the new grade." The clear intent of this rule is to assure that the current rate of pay of the employee prior to the downward movement does not increase after the movement occurs. Such an increase would defy the "downward" nature of the movement. Similarly, in the case of "lateral movements" under P-3-15, the intent of that rule is to assure that the nature of the movement is in fact lateral, not downward: the current rate of the employee prior to the lateral movement is to remain the same, or may increase up to the maximum. If "current rate" were interpreted otherwise, it would render the movement not a lateral, but a downward one.

This interpretation is consistent with every other compensation and layoff rule in Chapters 3 and 7. This regulatory scheme evinces an intent to retain base pay when classified employees transfer, accept retention rights in their current pay grade, reemploy, or make another lateral change in position. Statutes and agency regulations are to be construed as a whole, to give a consistent, harmonious, and sensible effect to all of their parts. *Halverstadt v. Department of Corrections*, 911 P.2d 654, 657 (Colo.App. 1995). *See also Martinez v. Continental Enterprises*, 730 P.2d 308 (Colo.

1986).

Director's Procedure P-3-11 provides that base pay rates shall remain the same in the case of system maintenance studies and individual allocations resulting in downward adjustments. Board Rule R-7-18, which delineates retention rights upon layoff, provides that in the event a "funded vacant position in the current certified class" is unavailable, the laid off employee next has retention rights to a "funded vacant position in a previously certified class **at the same maximum pay rate**" (emphasis added). The employee can only be demoted if there is no available position in the same class or pay grade. In that case, the employee must be offered the highest level demotion. This rule is designed to assure that laid off employees retain the same pay or, if that is not possible, suffer the smallest reduction in pay possible, upon exercise of retention rights. Director's Procedure P-3-8 simply clarifies that this rule also applies to those laid off employees who are later reemployed in the same class, per R-12-21. P-3-8 states, "**reemployed employees are compensated at the base pay rate held at the time of layoff.**" (Emphasis added).

The general principle governing compensation policy in Colorado, P-3-1, mandates: "Compensation practices shall provide for equitable and fair treatment of similarly situated employees." To treat laid off employees differently based on whether they exercise retention rights or are later reemployed violates P-3-1's mandate of treating similarly situated employees fairly and equitably. P-3-15 therefore must be applied consistently with P-3-8.

Reading R-7-18, P-3-1, P-3-8, P-3-11, P-3-12, and P-3-15 together as a cohesive whole, it is clear that the State's compensation policy is to assure base pay is preserved to the greatest extent possible in the event of a change in position, including layoff. The only obvious exception is demotion.

Policy considerations also compel this construction of "current rate" in P-3-15. As Complainant points out, if P-3-15 were construed as Respondent requests, then an employee who has gained base pay increases over the history of his or her employment could lose those increases any time an appointing authority makes a lateral transfer. This would result in base pay demotions without an actual demotion of the employee. Such a result may invite potential abuse. Lateral movements such as transfers or layoff situations should not become a pretext for downward movements and de facto demotions in pay.

Lastly, basic fairness demands this result. Classified employees who have earned increases in pay over time, through satisfactory or better performance, deserve to keep those increases. It is in the State's best interest to reward length of service through retention of base pay upon layoff. Seasoned classified employees possess unique knowledge, skills, and expertise: they know the state system, they know their agencies' culture and leaders, they know how to get things done. Additionally, a policy placing employees' pay increases at risk is likely to lead to a decline in employee morale and increased turnover, both of which are costly.

Respondent argues that because position #292 is funded through a grant, it cannot be compelled to provide additional funding for the position from other sources. However, notably, none of the Board rules or Director's procedures governing compensation in Chapter 3 addresses the

issue of how classified positions are funded. The compensation rules are designed to have universal effect, regardless of the various means by which agencies fund classified positions. Hence, it would be inappropriate to craft a quasi-judicial exception to those rules herein.

In conclusion, P-3-15 contemplates a retention of base pay upon lateral movement in the state classified system, consistent with all other existing compensation and layoff provisions. Further, P-3-1 mandates that all laid off classified employees be treated fairly and equitably, regardless of whether they are separated and are later reemployed, or whether they have the opportunity to immediately exercise retention rights. Finally, policy considerations and basic fairness call for retention of base pay earned over time upon exercise of retention rights.

### III. Saved Pay

Complainant asserts that it was arbitrary and capricious for Respondent to deny her saved pay in lieu of a higher salary. However, Director's Procedures P-3-6 and 12-25 define saved pay as the rate "that falls between the grade maximum and a statutory lid." Since Complainant's salary does not fall between the AA III pay grade maximum and a statutory lid, saved pay does not apply to her situation.

### IV. Attorney Fees.

Complainant requested an award of attorney fees in her original appeal form. However, none of the stipulated facts implicates the attorney fee issue, and Complainant did not brief this issue.

Attorney fees are to be awarded if it is found that a personnel action or appeal thereof was instituted frivolously, in bad faith, maliciously, as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. Board Rule R-8-38(A)(2) defines a personnel action as in bad faith, malicious, or as a means of harassment if it is "pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth."

While Respondent's interpretation of P-3-15 is questionable when viewed in the regulatory context outlined above, the agency appears to have held a good faith belief in its interpretation of the rule. Therefore, attorney fees are not warranted.

## **CONCLUSIONS OF LAW**

1. Respondent's action was arbitrary, capricious, or contrary to rule or law.
2. Complainant is not entitled to an award of attorney fees.

## **INITIAL DECISION**

Respondent's action is rescinded. Respondent is ordered to reinstate Complainant's salary at her former AA III level retroactive to the date she assumed position #292.

DATED this \_\_\_\_\_ day of  
July, 2003, at  
Denver, Colorado.

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Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln Street, Suite 1400  
Denver, Colorado 80203

#### NOTICE OF APPEAL RIGHTS

##### EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

#### PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

#### RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-#2136.

#### BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper



only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of July, 2003, I placed true copies of the foregoing **INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Mark A. Schwane  
Colorado Federation of Public Employees  
1580 Logan Street, Suite 310  
Denver, Colorado 80203

and in the interagency mail, addressed as follows:

Hollyce Farrell  
Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, Fifth Floor  
Denver, CO 80203

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